Supreme Court, U.S.
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In The

Supreme Court of the United States

ANTHONY ROSSO,

Petitioner,

v.

THE A.I. ROOT COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does a decisionmaker's age and disability-related statements made in the context of a meeting about a soon to be terminated employee's job performance, made six months prior to the termination, constitute direct evidence of discrimination under *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989), and its progeny.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Anthony Rosso, respectfully prays that a writ of certiorari issue to review the June 22, 2004, Opinion and Judgment of the *en banc* panel of the United States Court of Appeals for the Sixth Circuit and the prior panel decision rendered April 13, 2004, with respect to the issue of the existence of direct evidence of discrimination under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634, and the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213.

OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the Sixth Circuit, *Rosso v. A.I. Root Company*, No. 02-4384, denying the petition for *en banc* rehearing is reprinted at App. 25. The panel decision of the United States Court of Appeals for the Sixth Circuit is found at 97 Fed. Appx. 517, 2004 WL 829913, and is reprinted at App. 1. The decision of the District Court from which Petitioner appealed is reprinted at App. 10.

STATEMENT OF JURISDICTION

Petitioner seeks review from the opinions and judgments of the United States Court of Appeals for the Sixth Circuit of June 22, 2004, and April 13, 2004. 28 U.S.C. § 1254(1) grants the Supreme Court jurisdiction to review cases from the Court of Appeals.

STATUTES INVOLVED

This petition questions the meaning and interpretation of "direct evidence of discrimination" under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634, and the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213, as interpreted via *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989), and its progeny. Specifically, the Panel Opinion in this case creates a bright-line rule in which a six-month lapse in time acts as a bar to the consideration of direct evidence, no matter how invidious the statements and no matter the nexus between the invidious discriminatory comments and the adverse employment action (in this case, a termination). That rule, however, stands in direct contrast to the interpretation of direct evidence under *Price Waterhouse* in other circuits, and further exacerbates the rift among the circuits in their continued application of *Price Waterhouse* and the meaning of direct evidence in the context of age and disability discrimination.

STATEMENTS

1. Petitioner, Anthony Rosso, is a citizen of the County of Cuyahoga, State of Ohio. Mr. Rosso is the former materials manager of The A.I. Root Company, a candle manufacturer. At the time of hiring, Rosso was 58 years old. In November 1999 the owner and company president, John Root, along with his son and Vice President of the company, Brad Root, and the company's Chief Operating Officer, Bob Stanners, met to discuss John Root's intent to terminate Rosso. According to Mr. Stanners:

> [John Root] looked me straight in the eye and said, I want you to fire Tony Rosso. I asked why, and he said job performance. And I said I do his evaluations, and I thought Tony was doing a pretty good job. . . . [John] said, well, ***Tony's old and I've got reports that he has severe memory loss***. . . . Then [John] asked me – after he said that – you know, he asked me if [Rosso] had been on any type of medication. . . . [John] looked to Brad and said, ***sounds like early Alzheimer's Disease to me***. . . . then we got into – *[John] asked me if I knew when Mr. Rosso was going to retire.*

Stanners indicated that he thought it was inappropriate to discuss Mr. Rosso's age and a perception of disability in connection with a meeting about his termination. Immediately thereafter, Stanners submitted a memorandum to John Root expressing his disagreement and discomfort in discussing Rosso's age and medical problems and their relation to his termination. Within a month of that meeting, the company terminated Stanners' employment. Subsequently, Stanners sued the company for retaliation for engaging in protected activity, *i.e.*, his opposition to the termination of Mr. Rosso because of his age or disability, and secured a jury verdict in excess of $2,000,000. Approximately six months after the November 1999 meeting, and a mere four months after the unlawful termination of Bob Stanners, John Root terminated Rosso's employment. According to the company, his position was eliminated as part of a reduction-in-force. That reduction in force, however, consisted of only one employee, the same employee who only a few months earlier John Root had made clear and unambiguous comments that he wanted to terminate because he's old, has severe memory loss, and that there is a perception that he has early Alzheimer's Disease.

2. Accordingly, Mr. Rosso sued A.I. Root for age discrimination in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634, disability discrimination in violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101-12213, on the basis of a perceived disability (Alzheimer's disease), and wrongful discharge in violation of Ohio public policy premised on the same underlying civil rights violations.

3. The district court erroneously granted the company summary judgment on all claims, and a split Panel of the Sixth Circuit Court of Appeals affirmed the decision over a strongly worded dissent by Judge Karen Nelson Moore. The majority simply disregarded the express statement by the Owner and President of the Company that he wanted Plaintiff terminated because of age and factors consistent with a perceived disability. The Panel concluded that these statements were no longer direct evidence because of the passage of six (6) months time between the statement and the termination. This *bright-line* test, based solely upon the passage of time, ignores the underlying purpose of the ADEA and ADA, to eliminate unlawful stereotypes in employment decisions.

REASONS FOR GRANTING THE PETITION

COURTS ARE DIVIDED ON WHAT CONSTITUTES DIRECT EVIDENCE OF DISCRIMINATION.

The Panel disregarded binding precedent of the Sixth Circuit, and further enhanced the split among the federal circuits in refusing to provide Mr. Rosso with any inference that unlawful discrimination was *a factor* in his termination. To that end, the majority opinion acknowledged:

"Direct evidence of discrimination is 'that evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions.'" (Slip Opinion at 3) (quoting *Wexler v. White's Fine Furniture, Inc.*, 317 F.3d 564, 570 (6th Cir. 2003) (*en banc*) (quoting *Jacklyn v. Schering-Plough Healthcare Prods. Sales Corp.*, 176 F.3d 921, 926 (6th Cir. 1999)). By failing to give any credence whatsoever to the clear and unambiguous direct evidence presented by Mr. Rosso, in addition to the circumstances surrounding the termination, the Panel heightened the disparity between the circuits as to the meaning of direct evidence.

The Supreme Court initially interpreted employment discrimination statutes such as the ADEA and the ADA as requiring plaintiffs to prove that prejudice or discrimination based on the plaintiff's membership in a protected class alone motivated an employer's allegedly discriminatory action, *see McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981).

Realizing, however, that the *McDonnell Douglas* formulation did not account for a situation where an employer held both a permissible and an impermissible purpose for the employment decision, this Court, in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) created what has become known as a "mixed-motive" analysis. In so doing, the plurality articulated that a plaintiff's burden of initial proof is satisfied if one can prove that discriminatory animus or bias played a "motivating part" in the employment decision. *Id.* at 258. If the plaintiff makes this showing, the defendant can avoid liability only by proving by a preponderance of the evidence that "its legitimate

reason, standing alone, would have induced it to make the same decision." *Id.*

In a more narrow concurring opinion, Justice O'Connor argued that a plaintiff must prove that an illegitimate reason played a "substantial factor" in the employer's decision through "direct evidence" of the employer's reliance on the illegitimate reason. *Id.* at 276-77 (O'Connor, J., concurring). While federal courts apply the plurality *Price Waterhouse* decision according to this most narrow of its opinions, federal courts in various contexts continue to be perplexed and apply differing standards of "direct evidence" because Justice O'Connor's concurring opinion failed to provide any guidance in this regard. *Id.* at 277 (O'Connor, J., concurring) (failing to define "direct evidence").

In applying mixed motive analysis and determining what evidence constitutes direct evidence, the judicial circuits run the gamut. *See, e.g., Bass v. Board of County Commrs.*, 258 F.3d 1095, 1105 (11th Cir. 2001); *Shorter v. ICG Holdings, Inc.*, 188 F.3d 1204, 1207 (10th Cir. 1999) (quoting Black's Law Dictionary 460 (6th ed. 1990)); *Deneen v. Northwest Airlines, Inc.*, 132 F.3d 431, 438 (8th Cir. 1998); *Thomas v. Denny's, Inc.*, 111 F.3d 1506, 1512 (10th Cir. 1997); *Nichols v. Loral Vought Sys. Corp.*, 81 F.3d 38, 40 (5th Cir. 1996); *Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 736 (7th Cir. 1994) (all applying the classic definition of direct evidence, requiring evidence which proves that discrimination motivated a challenged employment action without need for an inference of discrimination). *But see Kubicko v. Ogden Logistics Servs.*, 181 F.3d 544, 553 (4th Cir. 1999); *Sheehan v. Donlen Corp.*, 173 F.3d 1039, 1044-46 (7th Cir. 1999); *Deneen v. Northwest Airlines, Inc.*, 132 F.3d 431, 436 (8th Cir. 1998); *Thomas v.*

NFL Players Ass'n, 131 F.3d 198, 204 (D.C. Cir. 1997); *Walden v. Georgia-Pacific Corp.*, 126 F.3d 506, 513 (3rd Cir. 1997) (all applying the animus plus definition of direct evidence, requiring evidence that proves a particularly strong case of discrimination through an inference). *But see Kerns v. Capital Graphics, Inc.*, 178 F.3d 1011, 1017 (8th Cir. 1999); *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1183 (2nd Cir. 1992) (all applying the animus definition of direct evidence, requiring evidence that simply proves animus towards a plaintiff's class to prove that discrimination occurred).

Thus, in defining direct evidence, the federal courts of appeal are split into three groups: those that apply or attempt to apply the classic definition of direct evidence (evidence proving that discrimination motivated a challenged employment action without need for an inference); those that apply an animus plus definition (evidence proving a particularly strong case of discrimination through an inference); and those that apply an animus definition (evidence simply proving animus towards a plaintiff's class to prove discrimination).

Circuits that take the classic position to applying Justice O'Connor's direct evidence requirement adhere to the literal definition of direct evidence as "evidence which, if believed, proves the existence of a fact in issue without inference or presumption." *Shorter v. ICG Holdings, Inc.*, 188 F.3d 1204, 1207 (10th Cir. 1999) (quoting Black's Law Dictionary 460 (6th ed. 1990)); *see also Nichols v. Loral Vought Sys. Corp.*, 81 F.3d 38, 40 (5th Cir. 1996); *Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 736 (7th Cir. 1994). These circuits hold that this type of evidence is in stark contrast to circumstantial evidence, which requires the factfinder to infer a discriminatory motive from the evidence

presented. *Shorter*, 188 F.3d at 1207. The Tenth Circuit, for example, has stated that direct evidence of personal bias is not equivalent to direct evidence of discrimination. *Id.* Under this theory, the classic circuits adopt the notion that a mixed-motive analysis is not automatically triggered where the trier of fact may conclude that the evidence yields both forbidden and permissible motives. *See Thomas v. Denny's, Inc.*, 111 F.3d 1506, 1512 (10th Cir. 1997). Instead, these circuits require not only that a mixture of motives be involved, but also that the forbidden motive was a primary motivation in the employment decision. *See id.*; *see also Bass v. Board of County Commrs.*, 258 F.3d 1095, 1105 (11th Cir. 2001); *Medlock v. Ortho Biotech, Inc.*, 164 F.3d 545, 550 (10th Cir. 1999); *Deneen v. Northwest Airlines, Inc.*, 132 F.3d 431, 438 (8th Cir. 1998) (stating that juries, and not judges, should decide close cases of employer motivation for allegedly unlawful employment decisions); *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1218-19 (5th Cir. 1995) (all applying the classic definition of direct evidence).

Circuits that apply the animus-plus analysis examine the strength of the evidence presented by plaintiffs to determine whether the plaintiffs have satisfied their evidentiary burden. *See Kubicko v. Ogden Logistics Servs.*, 181 F.3d 544, 553 (4th Cir. 1999) (stating that whether the employee satisfies the evidentiary threshold of discriminatory motive depends on the strength of the evidence). Unlike the classic circuits, animus-plus circuits will consider evidence other than "virtual admissions of illegality." *Venters v. City of Delphi*, 123 F.3d 956, 973 (7th Cir. 1997); *Thomas v. NFL Players Ass'n*, 131 F.3d 198, 204 (D.C. Cir. 1997). While the classic position deems evidence as direct according to a characterization of the proof, the

animus-plus position focuses on the relationship between the proof and accompanying incidents. The animus-plus circuits positively define direct evidence as "evidence that the decisionmakers placed substantial negative reliance on an illegitimate criterion." *Kubicko*, 181 F.3d at 552; *see also Walden v. Georgia-Pacific Corp.*, 126 F.3d 506, 513 (3rd Cir. 1997). According to the animus-plus circuits, statements that are vague and unconnected to a participant in the employment decision, or are remote in time in relation to the decision, are insufficient to establish a mixed-motive case. *Id.* at 515-16. Such statements do not satisfy the animus-plus requirement that the evidence must reflect the discriminatory animus on the part of the decisionmaker in connection with the employment decision at issue. Under this theory, even statements made by general decisionmakers are not considered as direct evidence if there is no evidence linking the statement to the contested decision. *Id.* While the Third and Fourth Circuits have consistently applied the animus-plus position, other circuits have chosen to apply it periodically, including the Eighth, Seventh, Fourth, and D.C. Circuits. *See, e.g., Taylor v. Virginia Union Univ.*, 193 F.3d 219, 232 (4th Cir. 1999) (en banc); *Sheehan v. Donlen Corp.*, 173 F.3d 1039, 1044-46 (7th Cir. 1999); *Deneen v. Northwest Airlines, Inc.*, 132 F.3d 431, 436 (8th Cir. 1998); *Thomas v. NFL Players Ass'n*, 131 F.3d 198, 203-05 (D.C. Cir. 1997). Only the animus-plus analysis raises the passage of time as an issue affecting the character and consideration of the evidence.

Circuits taking the animus approach to the direct evidence requirement do not bar any type of evidence, whether it is characterized as direct or circumstantial, so long as it is tied to the alleged discriminatory animus. *See*

Tyler v. Bethlehem Steel Corp., 958 F.2d 1176, 1183 (2nd Cir. 1992). According to the animus position, it is not even necessary that the evidence bear squarely on the challenged employment decision. The Second Circuit asserts that the non-circumstantial definition of direct evidence poses a basic problem: under the non-circumstantial touchstone, direct evidence of intent cannot exist, at least in the sense of evidence which, if believed, would establish the ultimate issue of intent to discriminate. *Id.* Animus circuits stress that employment discrimination cases, like any other civil litigation cases, adhere to the conventional rule that plaintiffs may prove their cases by direct or circumstantial evidence. *Id.* at 1184. Under the "animus only" theory, circumstantial evidence is of no less probative value than direct evidence. In *Tyler v. Bethlehem Steel Corp.*[1], the Court of Appeals for the Second Circuit concluded that the plaintiff produced enough evidence to gain access to a mixed-motive jury instruction even though the decisionmaker made no discriminatory statements in connection with the contested decision. The Tyler court held that "if there is no 'smoking gun' in [the plaintiff's] case, there is at the very least a thick cloud of smoke, which is certainly enough to require [the employer] to convince the factfinder that, 'despite the smoke, there is no fire.'" *Id.* at 1187. "Animus-only" circuits stress that such a high standard of proof is not necessary to demonstrate that, more likely than not, decisionmakers considered an impermissible factor in their employment decision. *See*

[1] *Tyler* involved employment decisions made because the company's demographics were getting older and it had to compensate for its aging sales force. 958 F.2d at 1179.

Kerns v. Capital Graphics, Inc., 178 F.3d 1011, 1017 (8th Cir. 1999).

The Sixth Circuit, however, does not appear to subscribe routinely to any of these formulations, but instead seems to rely on an amalgamation of several. Thus, for example in *Jacklyn v. Schering-Plough Healthcare Products Sales Corp.*, 176 F.3d 921 (6th Cir. 1999), the Sixth Circuit excluded the discriminatory statements of the terminated employee's manager as hearsay not bearing on the employment decision at issue. *Id.* at 927-28. *But see Ross v. Campbell Soup Co.*, 237 F.3d 701, 706 (6th Cir. 2002) (reversing the district court's grant of summary judgment to the employer on the issue of direct evidence of discrimination because of a perceived back injury because the employer had referred to the terminated employee as a "back case").

In this case, the Panel recognized that John Root provided, at a minimum, inconsistent reasons at the November 1999 meeting for the termination of Rosso. Nevertheless, the majority opines that Rosso failed to present sufficient direct evidence of age discrimination. This opinion is premised solely upon the passage of six and one-half months between the statement and the termination. Thus, the court, in stark contrast to applicable law and in exacerbation of the confusion of the various circuits, concluded that a mixed-motive analysis did not apply.

The conclusion of the majority is simply inconsistent with prior precedent in the Sixth Circuit and the confusing definitions of direct evidence applied by other circuits as to the definition and character of direct evidence. Indeed, the Panel improperly created a "bright line" by which employers can claim a safe harbor from direct evidence of discrimination. The Sixth Circuit, however, has long held that "a

corporate decision maker's express statement of a desire to remove employees in the protected group is direct evidence of discriminatory intent." *Nguyen v. City of Cleveland*, 229 F.3d 559 (6th Cir. 2000) (citing *LaPointe v. United Autoworkers Local 600,* 8 F.3d 376, 379-80 (6th Cir. 1993)). Other panels of the same court in more recent decisions have reaffirmed the conclusion. *DiCarlo v. Potter*, 358 F.3d 408, 416 (6th Cir. 2004) ("Although direct evidence generally cannot be based upon isolated and ambiguous remarks . . . when made by an individual with decision-making authority, such remarks become relevant in determining whether there is enough evidence to establish discrimination"); *Erwin v. Potter*, 79 Fed Appx. 893, 2003 WL 22514367, unreported at p. 4 (6th Cir. 2003) ("Racial slurs or statements that suggest that the decision-maker relied on impermissible stereotypes to assess an employee's ability to perform can constitute direct evidence"). Compare these pronouncements to those of other circuits discussed above.

In circuits adopting the classic definition of direct evidence, the passage of time has no bearing on the issue of the character of the evidence (*i.e.*, direct versus circumstantial). Those circuits adopting the animus-plus definition, however, take into consideration the remote nature of the evidence. Finally, those circuits that adopt the animus approach may apply a mixed-motive analysis and submit a case to a jury even in the absence of direct evidence. This fluctuating standard for the character, validity, and significance of direct evidence requires clarification from this Court. The Sixth Circuit merely serves as a microcosm of this confusion.

In the present case, the majority opinion of the panel concluded that the statements of John Rosso were "isolated

and ambiguous" because of the passage of six and one-half months. Initially, it would be difficult to conclude that the statements of John Root that he wanted to terminate Rosso because he was old and was rumored to have severe memory problems is not an ambiguous statement. Further, there can be no dispute that if the statement were made at the time of the termination it would have been "direct evidence" in the Sixth Circuit. *See Smith v Chrysler Corp.*, 155 F.3d 799, 805 (6th Cir. 1998) ("I fired you because you are disabled," offered as example of direct evidence). Thus, direct statements such as those presented in this case are direct evidence of discrimination.

Thus, this panel in its majority opinion has determined that somehow evidence that is direct, unambiguous, and consistent with the definition of "direct evidence" in the Sixth Circuit is no longer direct evidence because of the passage of time. Various circuits, however, have concluded that a five-month lapse between the reference to Plaintiff as a "problem person" and a "back case" and the termination of the Plaintiff does not affect the probative value of the evidence at the summary judgment stage. *See, e.g., Ross v. Campbell Soup Company*, 237 F.3d 701, 707 (6th Cir. 2001).

In the present case, there was certainly more evidence to buttress the probative value of the direct evidence presented by Mr. Stanner's testimony and the contemporaneous memorandum prepared by Mr. Stanners following the meeting with John Root and Brad Root. Construing the evidence in a light most favorable to Mr. Rosso, the intervening evidence between the statements of John Root and the termination of Anthony Rosso include (1) Stanner's objection to the unlawful behavior; (2) Stanner's reduction in job responsibilities; (3) Stanner's termination

without warning six weeks after he opposed the unlawful conduct of John Root; and (4) an assessment by Rosso's new supervisor in a period of only four (4) months that Rosso should be terminated with out a single written document assessing either his performance or the economic basis for his selection for termination.

If this was not enough evidence for a jury to consider, the panel noted that in the November 1999 meeting, John Root presented both Rosso's age/memory loss and his alleged performance as reasons for his termination. Further, the panel seemed to rely upon the Defendant's claim that Sandy Singer made his own observation of Mr. Rosso's "difficulties on the product line". Yet, in June 2000, Root and the Company ultimately terminated Rosso pursuant to a one-person reduction-in-force and denied that performance had anything to do with the decision to terminate.

In reaching the conclusion that it did, the panel cites various examples, including *Phelps v. Yale Security, Inc.*, 986 F.2d 1020 (6th Cir. 1993) (supervisor's comments made eight months prior to Phelps' discharge cannot create an inference of discrimination); *Wilson v. Reliance Trading Corp. of Am.*, No. 99-1181, 2000 WL 282357 (6th Cir. Mar. 6, 2000) (manager's two comments made *12 months* before discharge regarding the plaintiff's opportunities for "early retirement" are too isolated to give rise to an inference of discrimination); and *Kahl v. Mueller Co.*, No. 98-1176, 1999 WL 196556 (6th Cir. Apr. 1, 1999) (age-based

remark by a supervisor *eight months* prior to termination is insufficient to give rise to an inference of discrimination).[2]

The Panel in this case has now ratcheted back the time frame of the cases upon which it relied to six months without consideration of any other facts surrounding the termination and failing to construe the evidence in a light most favorable to Rosso. That "slippery slope" analysis, however, begs the question of what time frame is short enough to create a jury question as to direct evidence of discrimination. In this case, where John Root's animus is clear and unambiguous, should not a jury be the ultimate arbiter of what is and what is not discrimination? Given the various explanations and applications of "direct evidence", does one not require guidance from this Court as to the proper definition and application of direct evidence in age and disability discrimination cases?[3]

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[2] The court below failed to consider that actual testimony in each of the cases cited. In *Kahl*, the comments included (1) a comment that Plaintiff supervisor wanted to give him a "kick in the pants"; (2) statement of desire to place a "younger" person in the Indiana territory and (3) a comment that Plaintiff was "targeted" for termination. None of these comments referenced both the job action or the Plaintiff's age in any way that reflects age animus. In *Wilson*, the Plaintiff's supervisor asked him about early retirement on two occasions, 12 months and six months before termination. But the Court noted that they "were not constant or done in a way to put pressure on the plaintiff to retire." *Id.* at p.2. Thus, these innocuous retirement questions are not as direct or unambiguous as the statement that Rosso should be terminated because of age/memory problems.

[3] Petitioner is cognizant of this Court's decision on the issue of direct evidence in *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 123 S. Ct. 2148, 156 L. Ed. 2d 84 (2003). *Desert Palace*, however, is not applicable to this case because *Desert Palace* rested on an interpretation of 42 U.S.C. § 2000e-2(m)'s definition of "motivating factor" in Title VII cases. That statute is not applicable in the context of this case, because this

(Continued on following page)

Further, the Panel ignores that but for Stanners' opposition to John Root's discrimination (opposition that a jury has concluded unlawfully resulted in Stanners' termination), Root would have terminated Rosso immediately following the November 1999 meeting. The expressed intent for the meeting was clear. Instead, however, Root chose to fire Stanners first, and wait a few months before terminating Rosso. The conclusion that the timing is so clear that as a matter of law no reasonable fact-finder could conclude that Root was not, at least in part, motivated by Rosso's age or perceived disability in the termination decision is tinged with credulity, as John Root had already proven himself to harbor the exact stereotypes Congress enacted the ADEA and the ADA to combat. *See Wexler*, 317 F.3d at 571 ("Criticism of an employee's performance, even if true, which is linked to stereotypes associated with a Plaintiff's membership in a protected class is therefore squarely within the rubric of a mixed-motive analysis").

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case involves the ADEA and the ADA, not Title VII. Nevertheless, *Desert Palace* illustrates the difficulties courts have had in defining and intepreting "direct evidence" and the need for a uniform standard in all contexts.

CONCLUSION

It is respectfully requested that this Court grant this petition.

Respectfully submitted,

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NOT RECOMMENDED FOR PUBLICATION

No. 02-4384

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ANTHONY ROSSO, Plaintiff-Appellant, v. THE A.I. ROOT COMPANY, Defendant-Appellee.	) ON APPEAL FROM THE) UNITED STATES) DISTRICT COURT FOR) THE NORTHERN) DISTRICT OF OHIO

(Filed Apr. 13, 2004)

Before: SILER, MORE, and SUTTON, Circuit Judges.

SILER, Circuit Judge. Plaintiff Anthony Rosso appeals the district court's grant of summary judgment to Defendant The A.I. Root Company ("A.I. Root"), which disposed of his claims for age discrimination, disability discrimination, and violation of Ohio public policy, all arising from the termination of his employment. We **AFFIRM**.

BACKGROUND

John Root is president, and his son Brad is vice-president, of A.I. Root, a candle manufacturer. Bob Stanners, A.I. Root's chief operating officer, convinced John to hire a materials manager to implement a computerized materials planning software package. Rosso, then 58 years old, was hired as materials manager in 1997. In January 1999, Stanners evaluated Rosso's job performance; the results ranged from "usually exceeds position requirements" to "improvement needed." In November 1999,

John, Brad, and Stanners met to discuss Rosso's job performance ("November meeting"). Stanners testified that

> [John] looked me straight in the eye and said, I want you to fire Tony Rosso. I asked why, and he said job performance. And I said I do his evaluations, and I thought Tony was doing a pretty good job. . . . [John] said, well, Tony's old and I've got reports that he has a severe memory loss. . . . Then [John] asked me – after he said that – you know, he asked me if [Rosso had] been on any type of medication. . . . [John] looked to Brad [] and said, sounds like early Alzheimer's disease to me. . . . Then we got into – [John] asked me if I knew when Mr. Rosso was going to retire.

Shortly after the November meeting, John approved the purchase of $20,000 worth of computer software and training materials to aid Rosso in his position. Stanners submitted a memorandum to John expressing his discomfort from discussing Rosso's age and medical problems and their relation to his proposed termination.[1] In January 2000, Rosso received ratings similar to his 1999 evaluation and Stanners was discharged. Shandor Singer then began supervising Rosso. After A.I. Root's sales declined, Rosso was discharged at age 61 as a result of economic necessity in June 2000 and his position eliminated as part of a reduction in force ("RIF"), according to A.I. Root. The discharge was approximately six and one-half months after the November meeting.

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[1] A.I. Root strongly contests the integrity of this memo, claiming that Stanners fabricated it to support his retaliatory discharge claim against A.I. Root.

Rosso sued A.I. Root for age discrimination in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, disability discrimination in violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.*, discrimination based upon a perceived disability in violation of Ohio Revised Code § 4112.01 *et seq.*, and tortious discharge in violation of Ohio public policy. A.I. Root was granted summary judgment on all claims.

DISCUSSION

We review the district court's grant of summary judgment *de novo*. *Lautermilch v. Findlay City Schools*, 314 F.3d 271, 274 (6th Cir. 2003). "Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Id.*; *see* Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

The ADEA prevents employers from discharging any employee because of age, 29 U.S.C. § 623(a)(1), and limits its prohibitions to employees who are at least 40 years old. 29 U.S.C. § 631(a). A terminated employee may establish an ADEA claim by presenting direct or circumstantial evidence of discrimination. *Wexler v. White's Fine Furniture, Inc.*, 317 F.3d 564, 570 (6th Cir. 2003) (*en banc*) (citing *Kline v. Tennessee Valley Auth.*, 128 F.3d 337, 348 (6th Cir. 1997)). Rosso is proceeding only on a theory of direct evidence. "Direct evidence of discrimination is 'that evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions.'" *Id.* at 570 (quoting *Jacklyn v.*

Schering-Plough Healthcare Prods. Sales Corp., 176 F.3d 921, 926 (6th Cir. 1999)).

John gave inconsistent reasons at the November meeting when discussing Rosso's termination. A mixed-motive analysis applies to cases "where an adverse employment decision was the product of a mixture of legitimate and illegitimate motives." *Id.* at 571 (citing *Price Waterhouse v. Hopkins,* 490 U.S. 228, 247 (1989)), *superseded by statute on other grounds as stated in Norbuta v. Loctite Corp.,* No. 98-4162, 2001 WL 45114, at *9, 1 Fed.Appx. 305, 316 (6th Cir. Jan. 8, 2001). Rosso must first furnish direct evidence that A.I. Root considered impermissible factors when it decided to discharge him. *Wexler,* 317 F.3d at 571 (citing *Price Waterhouse,* 490 U.S. at 244-46). If Rosso demonstrates that A.I. Root's reason for his discharge "was made at least in part on a discriminatory basis, the burden shifts to [A.I. Root] to prove by a preponderance of the evidence that it would have taken the same adverse action even if impermissible factors had not entered into its decision." *Id.* at 571 (citing *Price Waterhouse,* 490 U.S. at 258).

Rosso fails to provide sufficient direct evidence of age discrimination. In *Phelps v. Yale Sec., Inc.,* 986 F.2d 1020, 1025 (6th Cir. 1993), Phelps was transferred and replaced with a younger employee because she was too old to be the plant manager's secretary, although she was told she still would be if she were younger. Phelps was laid off during a RIF nearly a year later and sued under the ADEA. This court found that the supervisor's comments made eight months before Phelps's discharge were too isolated and

ambiguous to support a finding of age discrimination.[2] *Id.* at 1026. Similarly, John's remarks were too isolated and ambiguous, as Rosso was employed for another six and one-half months before he was discharged. *Wilson v. Reliance Trading Corp. of Am.*, 2000 U.S. App. LEXIS 3644, at *4 (6th Cir. Mar. 6, 2000) (manager's two comments made approximately one year and six months before discharge too isolated to give rise to inference of discrimination); *Kahl v. The Mueller Co.*, 1999 U.S. App. LEXIS 6294, at *13 (6th Cir. Apr. 1, 1999) (alleged age-related comment made by supervisor eight months before termination deemed "stray remark temporally distant from termination and insufficient to give rise to inference of discrimination).

There is no evidence that John subsequently communicated any discriminatory animus to Singer when he and Singer discharged Rosso. The uncontradicted evidence shows that Singer made his own observations of Rosso's difficulties on the product line, among other problems, and decided independently that Rosso should be let go in view of economic concerns. Singer communicated that decision to John, who deferred to Singer's judgment. Thus, the isolated and ambiguous remarks made by John (who did not make the decision to terminate Rosso) more than six months before Rosso was terminated, are insufficient by themselves to be direct evidence of discrimination. *See Hopkins v. Elec. Data Sys. Corp.*, 196 F.3d 655, 662-63 (6th

[2] Phelps raised two comments made by her employer as allegedly age discriminatory: one from November 1987 and one from December 1987. After dismissing the December 1987 comment as ambiguous, the court found the November 1987 comment too isolated and temporally removed from Phelps's July 8, 1988 discharge to support a finding of age discrimination.

Cir. 1999) (isolated comment made by individual involved in termination process, but not decisionmaker, lacked sufficient nexus to plaintiff's termination six months later); *Greene v. St. Elizabeth Hosp. Med. Ctr.*, 1998 U.S. App. LEXIS 456, at *7-8 (6th Cir. Jan. 7, 1998) (single, isolated comment made by a non-decisionmaker eight months before adverse employment action is not direct evidence of discrimination). Moreover, due to economic necessity, Rosso was discharged and his position eliminated as part of a RIF. *See Barnes v. GenCORP, Inc.*, 896 F.2d 1457, 1465 (6th Cir. 1990) ("A work force reduction situation occurs when business considerations cause an employer to eliminate one or more positions within the company."). Summary judgment was proper.

Rosso next argues that he was discharged due to a perceived disability. The purpose of the ADA is to eliminate employment discrimination based upon disability. 42 U.S.C. § 12101. Ohio similarly precludes disability discrimination in employment. O.R.C. § 4112.02(A). A victim of discriminatory treatment may proffer direct evidence of intentional discrimination under the ADA. *Hopkins,* 196 F.3d at 660. Since Rosso's ADA and state law claims require the same essential elements, we can consider them simultaneously. *Chadha v. Hardin Mem'l Hosp.*, 202 F.3d 267, 2000 WL 32023, at *3 (6th Cir. 2000) (table).

Under 42 U.S.C. § 12102(2), "disability" is defined as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." *See also* O.R.C. §4112.01(A)(13) (same). Rosso contends that John's remarks at the November meeting constitute direct evidence that A.I. Root perceived him as disabled. This argument fails,

however, because A.I. Root's $20,000 investment in Rosso belies any argument that he was regarded as disabled. *See Kocsis v. Multi-Care Mgmt., Inc.,* 97 F.3d 876, 885 (6th Cir. 1996) (employee must demonstrate that "the perceived impairment is a substantial limitation on a major life activity"). Rosso cannot seriously contend that A.I. Root regarded him as disabled yet immediately invested a large sum of money in his work and risked his squandering it. If A.I. Root believed that Rosso was unable to perform his duties as materials manager, it would not have purchased the software and entrusted its economic prosperity with him. In addition, John's remarks were isolated and abstract since Rosso was discharged six and one-half months after the November meeting. *See Hopkins,* 196 F.3d at 661; *see also Wilson,* 2000 U.S. App. LEXIS 3644, at *4; *Kahl,* 1999 U.S. App. LEXIS 6294, at *13; *Greene,* 1998 U.S. App. LEXIS 456, at *7-8. Again, summary judgment was proper.

Rosso lastly contends that the trial court erred in granting A.I. Root summary judgment because of Ohio's exception to the employment-at-will doctrine, which applies "when an at-will employee is discharged or disciplined for a reason that contravenes clear public policy." *Kulch v. Structural Fibers, Inc.,* 677 N.E.2d 308, 321 (Ohio 1997). As Rosso failed to present direct evidence regarding either his age or disability discrimination claims, his public policy argument necessarily fails. *See Skrjanc v. Great Lakes Power Serv. Co.,* 272 F.3d 309, 317 (6th Cir. 2001) (failure to prove federal statutory violation precludes violation of Ohio public policy). Therefore, summary judgment was proper.

AFFIRMED.

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KAREN NELSON MOORE, Circuit Judge, dissenting. It is difficult to imagine more explicit direct evidence of age and disability discrimination than the direct statement by a supervisor that he wished to fire an employee, based partially on age, memory loss, and supposed early-onset Alzheimer's disease. That statement, made by the president of A.I. Root but six months before Anthony Rosso was discharged, provides sufficient direct evidence of age and disability discrimination to allow this case to go before a jury. I believe *Phelps v. Yale Security, Inc.*, 986 F.2d 1020 (6th Cir. 1993) is not to the contrary. While the time frame in this case is slightly shorter than in *Phelps,* I believe the lack of ambiguity in Root's comments and the evidence of an attempt to conceal unlawful discrimination (i.e., the firing of Bob Stanners) makes this a markedly different case. Here, the discriminatory comment was directed explicitly to the adverse employment action at issue.

This is not a situation where uncontroverted facts can provide support for two different motives in firing an employee; instead, John Root denies entirely making the comments at issue, and Root alleges that Stanners, the witness to these comments, fabricated a subsequent memo memorializing them. Stanners's retaliation claim, based on his own firing after his memo was written and sent, not only was allowed to go forward from the summary judgment stage by the district judge, but also has now resulted in a jury verdict for Stanners. John Root may not have made any further comments regarding Rosso's age and supposed disability, but that is entirely consistent with a realization by Root that Stanners wasn't going to "play along" and that further attempts at concealing Root's true motives might be necessary. The $20,000 investment in

software and training manuals could be further evidence of this attempt at concealment, and even if it is not, it merely places Root's intentions in dispute. Additionally, that Singer claimed to be the ultimate decisionmaker in firing Rosso does not mitigate entirely the power of Root's comments: if Stanners is to be believed (as he was by a jury), Root has been untruthful in his representations of past events, and it is no large leap to imagine him pressuring subordinates to do the same.

It is incomprehensible to me that in the face of this ultra-factual dispute, where one witness is lying outright, the majority would hold that Rosso failed to provide sufficient direct evidence of discrimination to withstand summary judgment The contrary evidence produced by A.I. Root does not close the book on Rosso's claims; that the court does so today is a fundamental misapplication of the summary judgment standard, and so I respectfully dissent.

Dated: November 12, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ANTHONY ROSSO, Plaintiff, vs. A.I. ROOT COMPANY, Defendant.	) Case No. 1:01CV2287) Judge Ann Aldrich) MEMORANDUM AND ORDER

The plaintiff, Anthony Rosso ("Rosso"), brings four claims against the defendant, the A.I. Root Company ("A.I. Root"), arising out of the termination of Rosso's employment at A.I. Root. A.I. Root has moved for summary judgment on each of Rosso's four claims (docket no. 26). For the following reasons, this Court grants A.I. Root's motion for summary judgment.

I. Background

A.I. Root manufacturers and sells decorative and religious candles. John Root is the president of A.I. Root. In early 1997, Robert Stanners ("Stanners"), A.I. Root's chief operating officer at the time, convinced John Root to hire a materials manager to implement a computerized materials planning software package. Rosso was a candidate for the position.

Rosso initially interviewed with Stanners, to whom Rosso would report, and with A.I. Root employees who would report to Rosso if he were hired. After these initial interviews, Stanners called Rosso and led Rosso to believe that he had been selected for the job, but that Rosso first

had to talk with the Root family. Rosso eventually met with John Root as well as Brad and Stuart Root, the vice-president and secretary of A.I. Root respectively. A few days after this meeting, in February 1997, A.I. Root hired Rosso as a materials manager. At the time, Rosso was 58 years old. His duties included scheduling operations, purchasing, warehouse, shipping and receiving. Rosso was also involved in implementing a system to determine an accurate forecast on an item by item basis for future production.

In January 1999, Stanners evaluated Rosso's job performance. Stanners awarded Rosso ratings of "2" and "3" in all but one performance category. A rating of "2" is generally defined as "usually exceeds position requirement." A rating of "3" is generally defined as "meets and sometimes exceeds position requirements." Rosso, however, received a rating of "4," generally defined as "improvement needed," in the category "job knowledge of a subordinate." On November 15, 1999, Stanners, John Root and Brad Root met to discuss Rosso's job performance ("November 1999 meeting"). Stanners, testifying at his April 27, 2001 deposition regarding the November 1999 meeting, stated that:

> [John] Root looked me straight in the eye and said, I want you to fire Tony Rosso. I asked why, and he said job performance. And I said I do his evaluations, and I thought Tony was doing a pretty good job. In fact, there were some people in that company that were doing a worse job. Tony was always responsible. And I sent him e-mails wanting to get things done, he would usually get back to me. Mr. Root said, well, Tony's old and I've got reports that he has severe memory loss. I said I have really never noticed any

> problems with his memory. Then [John] Root asked me – after he said that – you know, he asked me if he'd been on any type of medication. I said I didn't know if he was on any type of medication. I said I really didn't care if he was on any medication. There was nothing I was concerned about. [John] Root looked to Brad Root and said, sounds like early Alzheimer's disease to me. Brad said, well, I can check maybe the medical records and see if he's on any medication. Then we got into – [John] Root asked me if I knew when Mr. Rosso was going to retire. . . .

Stanners Dep. at 65:20-66:24. Shortly after the meeting, John Root approved the purchase of $20,000.00 worth of software and training to support Rosso in his position as a materials manager. Rosso alleges that, on November 18, 1999, Stanners followed up on the meeting by drafting a memorandum expressing his discomfort with the discussion of Rosso's age and medical problems, marking it confidential, and sending it by interoffice mail to John Root.[1]

Stanners again evaluated Rosso in January 2000. Stanners awarded Rosso ratings identical to those Rosso had received in January 1999 except that Rosso now received a rating of "4" in the category of "job knowledge." After A.I. Root discharged Stanners in January 2000, Sandy Singer ("Singer"), the manufacturing manager,

[1] A.I. Root contends that the memorandum is a fabrication drafted by Stanners well after the November 1999 meeting to support Stanners' retaliation claim against A.I. Root. A.I. Root notes that John Root never received the memorandum and that it could not be found on Stanners' office computer. John Root further denies making the statements attributed to him by Stanners.

began supervising Rosso. Singer allegedly was troubled by Rosso's lack of understanding of A.I. Root's products, and his inability to gain the respect of his peers. Singer, however, believed that Rosso's performance improved during the three to four months that he supervised Rosso. In May 2000, A.I. Root's sales were in decline. At the same time, inventory expenses were increasing, and warehouse and shipping expenses had increased by 34%. On June 5, 2000, John Root and Singer, citing A.I. Root's economic difficulties, informed Rosso that he was being discharged.

II. Summary Judgment Standard

Pursuant to Federal Rule of Civil Procedure 56(c), summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25 (1986). The burden then shifts to the nonmoving party to demonstrate the existence of a material dispute as provided in Rule 56(e):

> [a]n adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Fed. R. Civ. P. 56(e); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). Parties opposing summary judgment must go beyond the pleadings and produce some type of evidentiary material in support of their position. *See Celotex*, 477 U.S. at 324.

In determining whether a genuine issue of material fact exists, this Court must view the evidence in a light most favorable to the nonmoving party. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *White v. Turfway Park Racing Assn.*, 909 F.2d 941, 943-44 (6th Cir. 1990). A fact is "material" only if its resolution will affect the outcome of the lawsuit. *Anderson*, 477 U.S. at 248. Determination of whether an issue is "genuine" requires consideration of the applicable evidentiary standards. Thus, in most civil cases, the Court must decide whether the evidence is such that "reasonable jurors could find by a preponderance of the evidence that the [nonmoving party] is entitled to a verdict" or whether the evidence is "so one-sided that [the moving party] must prevail as a matter of law." *Id.* at 252. Rule 56(c) "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322.

III. Analysis

Rosso brings the following claims: (1) discrimination in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*; (2) discrimination on the basis of a perceived disability in violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, *et seq.*;

(3) discrimination on the basis of a perceived disability in violation of Ohio Revised Code § 4112.01 *et seq.* ("§ 4112"); and (4) wrongful discharge in violation of Ohio public policy on the basis of his age and disability discrimination claims.

A. Age Discrimination in Employment Act

Rosso first claims that A.I. Root discharged him because of his age, 61 at the time of his discharge. Under the ADEA, it is unlawful for an employer to discharge or fail to hire any individual 40 years of age or older or otherwise discriminate against that person with respect to compensation, terms, conditions, or privileges of employment "because of such individual's age." 29 U.S.C. § 623(a). An ADEA plaintiff's case may be submissible to a jury if she presents direct evidence that the defendant discharged the plaintiff because of his age. *See Manzer v. Diamond Shamrock Chemicals Co.,* 29 F.3d 1078, 1081 (6th Cir. 1994). When a plaintiff presents "credible direct evidence of discrimination, discriminatory animus may be at least part of an employer's motive, and in the absence of an alternative, non-discriminatory explanation for that evidence, there exists a genuine issue of material fact suitable for submission to the jury without further analysis by the court." *Norbuta v. Loctite Corp.,* 1 Fed.Appx. 305, 312 (6th Cir. 2001) (citing *Blalock v. Metals Trades, Inc.,* 775 F.2d 703, 707-12 (6th Cir. 1985). "Direct evidence" is defined as evidence in which, if it is believed, would prove the existence of a fact (i.e. unlawful discrimination) without any inferences or presumptions. *See Lautner v. American Tel. and Tel. Co.,* 1997 WL 26467, at *3 (6th Cir. Jan 22, 1997).

Even without direct evidence of age discrimination, an ADEA plaintiff may still make a submissible case by presenting evidence from which the jury may infer an invidious intent behind the plaintiff's discharge. *See Manzer,* 29 F.3d at 1081. The process by which the sufficiency of such a case is tested was set forth in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973). *See id.* Under the *McDonnell Douglas* framework, a plaintiff must first establish a prima facie case of discrimination by introducing evidence sufficient to support the finding that (1) he was a member of the protected class; (2) he suffered an adverse employment action; (3) he was qualified for the position lost; and (4) he was replaced by a younger person. *See Marano v. Aircraft Braking Sys., Inc.,* 138 F.Supp.2d 940, 949 (N.D. Ohio 2001). However, because A.I. Root has produced evidence demonstrating that Rosso was discharged as part of a reduction in force ("RIF"), the Court must consider the law applicable to RIF's.[2] *See Scott v. Goodyear Tire & Rubber Co.,* 160 F.3d 1121, 1126 (6th Cir. 1998). In cases involving a RIF, the elements of the *prima facie* case are modified to require a heightened proffer of evidence. *See Ercogovich v. Goodyear Tire & Rubber Co.,* 154 F.3d 344, 357 (6th Cir. 1998). Although the first three prongs of the test remain the same, to meet the fourth prong a plaintiff must submit "addition [sic] direct, circumstantial, or statistical evidence tending to indicate

[2] "A RIF occurs when business considerations cause an employer to eliminate one or more positions within the company." *Steiner v. Envirosource, Inc.*, 134 F.Supp.2d 910, 916 (N.D. Ohio 2001) (quoting *Barnes v. GenCorp, Inc.*, 896 F.2d 1457, 1465 (6th Cir. 1990)). A.I. Root has alleged that Rosso was discharged due to economic conditions, and the parties do not dispute that Rosso has not been replaced. The Court, therefore, finds that Rosso was discharged pursuant to a RIF.

that the employer singled out the plaintiff for discharge for impermissible reasons." *Id.* at 350. "If the plaintiff makes out a prima facie case, the burden shifts to the employer to describe a legitimate, non-discriminatory reason for the employment action. [cites omitted]. If the employer gives a legitimate, non-discriminatory reason for the employment action then the employee must show the employer's stated reason is pretextual." *See Marano,* 138 F.Supp.2d at 949 (citing *McDonnell Douglas,* 411 U.S. at 802).

As A.I. Root points out, Rosso's discrimination claims rely entirely on the statements made by John Root at the November 1999 meeting. At that meeting, Stanners asked John Root why he wanted to discharge Rosso. Initially, John Root answered "job performance." After Stanners came to Rosso's defense, John Root allegedly commented that Rosso was old and that he had received reports that Rosso was suffering from memory loss. John Root then allegedly asked when Rosso was due to retire. It is undisputed that, shortly after the meeting, John Root approved the purchase of $20,000.00 worth of training and software for Rosso. It is further undisputed that A.I. Root did not discharge Rosso until nearly seven months after the November 1999 meeting, in June 2000.

Viewing the evidence in the light most favorable to Rosso, John Root's statements do not constitute direct evidence of age discrimination or indicate that A.I. Root singled out Rosso for discharge on the basis of his age. "[N]ot all age-related comments create a genuine issue of material fact necessary to survive summary judgment. *See Leonard v. Twin Towers,* 6 Fed.Appx. 223, 229 (6th Cir. 2001) (citing *Gagne v. Northwestern Nat'l Ins. Co.,* 881 F.2d 309, 314 (6th Cir. 1989)). The ultimate question in an age discrimination suit is whether the employer intentionally

discriminated against the plaintiff because of his age. *See Leonard,* 6 Fed.Appx at 299 (citing *Woythal v. Tex-Tenn Corp.,* 112 F.3d 243, 245-46 (6th Cir. 1997)).

The Sixth Circuit has consistently held that "isolated and ambiguous statements. . . . are too abstract, in addition to being irrelevant and prejudicial, to support a finding of. . . . discrimination." *Hopkins v. Electronic Data Sys. Corp.,* 196 F.3d 655, 661 (6th Cir. 1999) (quoting *LaPointe v. United Autoworkers Local 600,* 8 F.3d 376, 380 (6th Cir. 1993)); *Weigel v. Baptist Hospital of East Tennessee,* 302 F.3d 367, 382 (6th Cir. 2002). In *Hopkins,* a disability discrimination case, the Sixth Circuit held that a supervisor's comment – "the mentally ill guy on Prozac that's going to shoot the place up" – was not direct evidence of discrimination. *See id.* The court contrasted the one statement made in that case with the repeated racial slurs that were found to constitute direct evidence of discrimination in *Talley v. Bravo Pitino Restaurant, Ltd.,* 61 F.3d 1241 (6th Cir. 1995). *See Hopkins,* 196 F.3d at 661. Similarly, in *Phelps v. Yale Security, Inc.,* a supervisor told the plaintiff that "she was too old to be Petty's secretary and that she would still be the plant manager's secretary if she were younger." 986 F.2d 1020, 1025 (6th Cir. 1993). The Sixth Circuit held that the supervisor's comments were too isolated to constitute direct evidence of discrimination. *See id.* at 1022. In this case, there is no evidence of repeated age-related slurs. Rather, Rosso has alleged only one instance in which Root allegedly made two age-related statements.

Further, there is no evidence that Root's statements were made with regard to Rosso's discharge. "In order for age-related comments to support a finding of intentional discrimination, there must be some connection between

the discriminatory comments and the adverse employment decision." *Leonard,* 6 Fed.Appx. at 299. Similarly, "[a] proffer of direct evidence 'must not only speak directly to the issue of discriminatory intent, it must relate to the specific employment decision in question.'" *Butcher v. Gerber Prods. Co.,* 88 F.Supp.2d 788, 793 (W.D. Mich. 2000) (quoting *Cowan v. Glenbrook Security Services., Inc.,* 123 F.3d 438, 443 (7th Cir. 1997)). While it is true that, in the same meeting, John Root both instructed Stanners to discharge Rosso and made age-related statements, John Root did not state that he wanted to fire Rosso because he was old and near retirement. Rather, when Stanners directly asked John Root why he wanted to discharge Rosso, John Root initially stated "job performance." John Root's age-related statements were made with regard to reports he had received concerning Rosso's job performance. Similarly, any decision to discharge Rosso was not made as a result of the November 1999 meeting as evidenced by the fact that John Root approved the purchase of $20,000.00 worth of training and software for Rosso. Finally, Rosso's alleged statements – made nearly seven months prior to Rosso's discharge – were distant in time and fact from Rosso's discharge. *See Kennedy v. Schoenberg, Fisher & Newman, Ltd.,* 140 F.3d 716, 724 (7th Cir. 1998) (alleged discriminatory comment by a law firm partner is not direct evidence of discrimination, in part, because it was made at least five months before the plaintiff's discharge); *Phelps,* 986 F.2d at 1020 (noting that a comment made approximately one year before the plaintiff was discharged was "too long before the layoff to have influenced the termination decision."). Root's alleged statements at the November 1999 meeting, therefore, do not constitute direct evidence of age discrimination or

indicate that A.I. Root discharged Rosso because of Rosso's age.

Even if Rosso could satisfy his *prima facie* case, A.I. Root has articulated a legitimate, non-discriminatory reason for Rosso's discharge, namely, that eliminating his position was in the best interests of A.I. Root. A.I. Root has submitted evidence suggesting that increased competition from overseas and from large, domestic candle companies led to decreased sales in the two to three years preceding Rosso's termination. In addition, A.I. Root argues that Rosso's position was an expendable one, in that it merely created an extra layer of management. Singer testified at his deposition that he had determined that A.I. Root could operate without a materials manager. Singer Dep. at 28:8-28:17. Thus, the defendants have produced evidence supporting their legitimate, non-discriminatory reason for discharging Rosso.

Because A.I. Root has put forward a legitimate non-discriminatory reason for discharging Rosso, the burden shifts to Rosso to show that A.I. Root's reason is pretextual. *See Marano,* 138 F.Supp.2d at 949. To establish pretext, a plaintiff must demonstrate by a preponderance of the evidence "(1) that the proffered reasons had no basis in fact, (2) that the proffered reasons did not actually motivate his discharge, or (3) that they were insufficient to motivate discharge." *Manzer,* 29 F.3d at 1084. Rosso has presented no evidence rebutting A.I. Root's legitimate reason. Based on the evidence Rosso has provided, the only conceivable approach upon which Rosso could rely is the second approach. For the reasons given above, Rosso cannot show by a preponderance of the evidence that A.I. Root's legitimate reason for discharging Rosso did not actually motivate his discharge. Accordingly, summary

judgment in favor of A.I. Root on Rosso's ADEA claim is appropriate.

B. Americans with Disabilities Act and Disability Discrimination under Ohio Revised Code § 4112

Rosso also claims that A.I. Root discharged him because A.I. Root regarded Rosso as suffering from a disability, memory loss. Because the essential elements of a claim under Ohio law and the ADA are the same, this Court will examine Rosso's state and federal claims together. *See Williams v. Emco Maier Corp.*, 212 F.Supp.2d 780, 783 (S.D. Ohio 2002); *Hofman v. Fidelity Brokerage Services, Inc.*, 959 F.Supp. 452, 457 n. 1 (S.D. Ohio 1997) (concluding that case law pertaining to claims brought pursuant to ADA applies equally to claims brought under Ohio discrimination statute); *Columbus Civ. Serv. Comm. v. McGlone*, 697 N.E.2d 204, 206-07 (Ohio 1998) (stating that Ohio courts may look to cases interpreting the ADA for guidance in interpreting Ohio statute).

To establish a *prima facie* case of disability discrimination, Rosso must demonstrate: (1) that he is disabled; (2) that he is otherwise qualified for the job, with or without reasonable accommodation; (3) that he suffered an adverse employment decision; (4) that A.I. Root knew or had reason to know of his disability; and (5) that, after his discharge, the position remained open, or he was replaced. *See Monette v. Elec. Data Sys. Corp.*, 90 F.3d 1173, 1185 (6th Cir. 1996); *see also Columbus Civ. Serv. Comm.*, 697 N.E.2d at 206 (holding that, to establish a *prima facie* case of disability discrimination under Ohio law, plaintiff must show: (1) that he was handicapped; (2) that an adverse employment action was taken by his employer, at least in

part, because he was handicapped; and (3) that the employee can safely and substantially perform the essential functions of the job in question with reasonable accommodation). Likewise, when an employee is discharged as part of a RIF, the elements of the *prima facie* case are modified to require a heightened proffer of evidence. *See Wilson v. Firestone Tire & Rubber Co.,* 932 F.2d 510, 517 (6th Cir. 1991). This duty is heightened because, as long as they act without discriminatory intent, employers retain the right to "eliminate positions in the name of economic necessity or efficiency, even when those position [sic] are held by [disabled] workers." *Id.* Rosso, therefore, must also present "additional direct, circumstantial, or statistical evidence tending to indicate that A.I. Root singled out Rosso for discharge for impermissible reasons." *Barnes,* 896 F.2d at 1465. If Rosso succeeds in presenting a *prima facie* case, then the burden shifts to A.I. Root to articulate a legitimate, non-discriminatory reason for its employment action. *See Monette,* 90 F.3d at 1185-86; *Hood v. Diamond Prods., Inc.* 685 N.E.2d 738, 741 (Ohio 1996). If A.I. Root succeeds in doing so, then the burden shifts back to Rosso to demonstrate that A.I. Root's articulated reason constitutes pretext. *See Monette,* 90 F.3d at 1186; *Hood,* 658 N.E.2d at 742.

As is the case with Rosso's ADEA claim, the only evidence of disability discrimination proffered by Rosso is the statements made by John Root at the November 1999 meeting. Pertinent to Rosso's disability discrimination claim, John Root allegedly commented that he had heard reports that Rosso was suffering from memory loss. John Root also allegedly asked whether Rosso was taking any medication and speculated that Rosso may be suffering [sic] Alzheimer's disease. For the reasons listed above,

John Root's alleged statements do not constitute direct evidence of disability discrimination or indicate that A.I. Root singled out Rosso for discharge on the basis of perceived disability. John Root's alleged statements were isolated and ambiguous, not repeated. *See Hopkins,* 196 F.3d at 661. In addition, the statements did not relate to Rosso's discharge. *See Butcher,* 88 F.Supp.2d at 793. John Root did not decide to discharge Rosso at the November 1999 meeting, and, in fact, purchased software and training for Rosso shortly after the meeting. Finally, the statements were made nearly seven months prior to Rosso's discharge. *See Kennedy,* 140 F.3d at 724. Moreover, as noted above, Rosso has failed to present any evidence rebutting A.I. Root's legitimate non-discriminatory reason for discharging Rosso. Accordingly, summary judgment in favor of A.I. Root on Rosso's ADA and § 4112 claims is appropriate.

D. Violation of Public Policy Under Ohio Law

The Sixth Circuit has held that where an Ohio public policy claim is premised upon a federal statute, the failure to prove the essential elements of a claim under that statute bars a claim under Ohio public policy. *See Skrjanc v. Great Lakes Power Serv. Co.,* 272 F.3d 309, 317 (6th Cir. 2001) (holding that, because plaintiff was unable to show violation of the Family Medical Leave Act, his Ohio public policy claim which derived from his FMLA claim also failed). As noted above, the evidence does not support Rosso's age and disability claims. Rosso's Ohio public policy claim, therefore, must also fail. Accordingly, summary judgment in favor of A.I. Root on Rosso's Ohio public policy claim is appropriate.

CONCLUSION

For the foregoing reasons, this Court grants A.I. Root's motion for summary judgment on Rosso's ADEA, ADA, Ohio Revised Code § 4112, and Ohio public policy claims.

IT IS SO ORDERED.

s/ Ann Aldrich
ANN ALDRICH
UNITED STATES
DISTRICT JUDGE

Dated: November 12, 2002

No. 02-4384

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ANTHONY ROSSO, Plaintiff-Appellant, v. A.I. ROOT COMPANY, Defendant-Appellee.	)	ORDER (Filed Jun. 22, 2004)

BEFORE: SILER, MOORE, and SUTTON, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Moore would grant rehearing for the reasons stated in her dissent.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

(3)

No. 04-390

Supreme Court, U.S.
FILED
OCT 2 2 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

ANTHONY ROSSO,

Petitioner,

v.

THE A.I. ROOT COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent, The A.I. Root Company, has no parent corporation and no publicly held company owns 10% or more of its stock.

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INTRODUCTION

Petitioner Anthony Rosso, Respondent A.I. Root's former Materials Manager, was terminated in June, 2000 for economic reasons. Six and one-half months earlier, on November 15, 1999, John Root, President of A.I. Root, and Brad Root, a Vice President, had met with then Chief Operating Officer Bob Stanners to discuss Mr. Rosso's performance. John Root wanted to terminate Mr. Rosso because of job performance, but Mr. Stanners convinced him not to do it. Mr. Rosso claims that Mr. Root also said he heard rumors that Rosso had memory problems, asked when he was going to retire, and made an allusion to early Alzheimer's. It is undisputed that at the meeting Mr. Stanners asked for, and John Root approved, $20,000 in new software and training to assist Mr. Rosso with his job and help his performance. He was eventually let go by his supervisor, Manufacturing Manager Sandy Singer, as part of corporate cutbacks in June, 2000.

Both the District Court [Pet. App. 19-20, 22-23] and the Court of Appeals [Pet. App. 4, 7] determined that John Root's alleged comments were not direct evidence of discrimination as a matter of law, and that Mr. Rosso was terminated for legitimate, non-discriminatory reasons, i.e., an economic reduction in force [Pet. App. 2, 16].

Mr. Rosso makes two arguments in support of his Petition for a Writ of Certiorari. First, that the Sixth Circuit disregarded its own binding precedent concerning direct evidence and, second, that the opinion below "enhanced a split among the federal circuits as to the meaning of direct evidence" [Pet. 4-5]. Yet the Question Presented for Review [Pet. i] appears to be the identical question of fact and law

presented below: did the Petitioner meet his burden of producing sufficient admissible evidence of discrimination to warrant a jury trial. This is not a question that merits this Court's plenary review.

PETITIONER'S MISSTATEMENTS OF FACT AND INCORRECT CHARACTERIZATIONS OF THE RECORD

Pursuant to Sup. Ct. R. 15.2, Respondent respectfully points out to this Court the following instances where it perceives that Petitioner has incorrectly stated the facts or did not correctly state the record.

1. Petitioner misstates the Sixth Circuit's holding when he claims that the "Panel concluded that these statements were *no longer* direct evidence because of the passage of six months time between the statement and the termination." [Pet. 4, 13] (emphasis added). Rather, the court of appeals held that the alleged comments were "insufficient by themselves to be direct evidence of discrimination." [Pet. App. 5]. The Panel never determined that the comments were once direct evidence and then became stale.

2. Petitioner incorrectly claims that the Sixth Circuit determined that the comments were not direct evidence "based solely on the passage of time . . ." [Pet. 4]. Several more factors played a part in this ruling. The Panel also found that "John's remarks were too isolated and ambiguous," and went on to say that "[t]here is no evidence that John subsequently communicated any discriminatory animus to Singer [the decisionmaker]." [Pet. App. 5].

3. Petitioner improperly characterizes John Root as the "decisionmaker" in his Question Presented for Review and

perpetuates that mistake throughout his argument. The record shows that it was Mr. Singer, Petitioner's supervisor, who "decided independently that Rosso should be let go in view of the economics [and] communicated that decision to John, who deferred to Singer's judgment." [Pet. App. 5]. The Panel specifically noted that John Root "did not make the decision to terminate Rosso." [Pet. App. 5].

4. Petitioner incorrectly states repeatedly that the Panel Opinion created a "bright-line rule" in which a six-month lapse of time acts as a bar to the consideration of direct evidence. [Pet. 2, 4, 11, 15]. Nowhere in the opinion below does the Sixth Circuit announce a bright-line test of any kind.

5. Petitioner incorrectly states that the record reflects "the express statement by the Owner and President of the company that he wanted Plaintiff terminated because of his age and factors consistent with a perceived disability." [Pet. 4]. Throughout his brief, Petitioner repeats the misstatement that John Root said he wanted to fire Petitioner "because he was old." [Pet. 3, 4, 13]. The actual comments attributed to John Root are cited in full at Pet. 3 and contain the following exchange between Mr. Stanners and Mr. Root: "[John Root] looked me straight in the eye and said, I want you to fire Tony Rosso. I asked why, and he said job performance. . . ."

6. Petitioner's references to a jury award received by former A.I. Root Company employee Stanners in a separate lawsuit should be stricken and disregarded from Petitioner's brief. Neither the verdict nor any other aspect of that case

was part of the record below. Fed. R. App. P. 10(a) provides that:

> [t]he following items constitute the record on appeal:
>
> (1) the original papers and exhibits filed with the district court;
>
> (2) the transcript of the proceedings, if any; and
>
> (3) a certified copy of the docket entries prepared by the district clerk.

A jury verdict in an entirely different lawsuit brought by a co-worker, rendered eight months after the district court granted summary judgment in the instant case, could not possibly be part of the "original papers and exhibits" in this case.

Petitioner makes no attempt to vouch for the authority or admissibility of this out-of-record reference in his brief. Although not presented to the court or the parties as such, it would not qualify as a "supplemental authority" either, under Fed. R. App. P. 28(j). Rule 28(j) only allows a party to bring new authorities to the attention of the court. It is not designed to bring in new evidence through the back door. *Trans-Sterling, Inc. v. Bible,* 804 F.2d 525, 528 (9th Cir. 1986).

REASONS FOR DENYING THE PETITION

The Writ should be denied for several reasons. Contrary to Petitioner's claim, the decision below followed controlling Sixth Circuit precedent; Petitioner has waived any argument attacking the applicable precedent by his own prior judicial admissions; Petitioner never raised the issue of conflicting definitions of direct evidence at any stage below; this petition merely seeks an advisory opinion; there is no compelling reason to grant a Writ where the claimed error consists of the misapplication of a properly stated rule of law (Sup. Ct. R. 10).

I. The Panel Followed Binding Sixth Circuit Precedent Defining Direct Evidence in Discrimination Cases.

Petitioner first claims that "[t]he Panel disregarded binding precedent of the Sixth Circuit . . ." and cites the Panel's definition of direct evidence without explaining what specific precedent was ignored [Pet. 4-5]. The Panel relied on *Wexler v. White's Fine Furniture, Inc.*, 317 F.3d 564, 570 (6th Cir. 2003) (*en banc*), which defines direct evidence as "that evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." [Pet. App. 5], (quoting *Jacklyn v. Schering-Plough Healthcare Prods. Sales Corp.*, 176 F.3d 921, 926 (6th Cir. 1999)). In *Wexler*, the Sixth Circuit held that the plaintiff had presented direct evidence of age discrimination, because the alleged discriminatory comments "were made by the decisionmaker, indicated a belief that a person's capabilities as a store manager diminish with age, and the first five [alleged age biased comments] were directed at Wexler at the very time he was being demoted." *Wexler*, 317 F.3d at 572. The Sixth Circuit properly relied on three

legitimate factors: that the comments were made by a decisionmaker, that they were made in reference to the adverse employment decision and were made at or near the time of that adverse employment decision. *Id.*

The Panel below used that same analysis in determining that Mr. Rosso failed to adduce direct evidence of age and disability discrimination. Both Petitioner and the Panel acknowledged that a plaintiff may rely on direct or circumstantial evidence, or both, in proving age and disability claims [Pet. App. 3]. Mr. Rosso made it clear that he was proceeding only on a theory of direct evidence [Pet. App. 3; Reply Brief 5]. It consisted solely of John Root's comments at the November 15, 1999 meeting. Consistent with the Sixth Circuit's definition of direct evidence, the Panel concluded that there were five reasons why the Root comments were not direct evidence of age or disability discrimination: 1) Root was not the decisionmaker; 2) the comments were not made in the context of the adverse employment decision; 3) the comments were not made at or near the time of the adverse employment decision but six and a half months earlier; 4) the comments were stray, isolated and ambiguous remarks; 5) Root's conduct in investing $20,000 in training for Petitioner immediately following the comments negated any inference of animus [Pet. App. 4-7]. In addition, the Panel correctly found that Petitioner failed to demonstrate that the Respondent's proffered reason – an economic driven reduction in the workforce – did not actually motivate the discharge [Pet. App. 4-7].

II. Petitioner Has Waived Any Argument Concerning the Applicable Controlling Definition of Direct Evidence.

Petitioner never raised the issue of conflicting definitions among the circuits at any stage below. In fact, Petitioner admitted in his brief to the Sixth Circuit, at p. 14, "However, though correctly identifying the case law which applied to a direct evidence case, the Court failed to grant any inference in favor of Anthony Rosso." Mr. Rosso did not claim the district court applied the wrong law, but that its application to the facts of his particular case reached the wrong conclusion. This is the same argument made in this petition.

The district court's definition of direct evidence, which Petitioner agrees is correct, is found at p. 5 of its Memorandum Opinion: "Direct evidence is defined as evidence in which, if it is believed, would prove the existence of a fact (i.e., unlawful discrimination) without any inferences or presumptions." [Pet. App. 15]. In his brief to the Sixth Circuit, petitioner urges the same definition at p. 15 and cites *Wexler, supra*, and *Jacklyn, supra*. The Sixth Circuit's opinion also recites and relies on the same controlling cases and the exact same definition of direct evidence [Pet. App. 3-4]. There was no conflict or confusion. Petitioner was satisfied that his evidence was tested by the correct definition of direct evidence.

Prior to this petition there was never any discussion or argument in any pleading by either party or the opinion of either court in this case concerning conflicting definitions of direct evidence.

III. This Petition for a Writ of Certiorari Merely Seeks an Advisory Opinion.

The major portion of Petitioner's legal argument is devoted to a legal analysis of various approaches to direct evidence that has nothing to do with this case. [Pet. App. 4-11]. Petitioner begins with the historical development of the mixed-motive versus pretext framework for proving discrimination, beginning with *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989). The brief then goes into a lengthy analysis of circuit court decisions that turn on the direct evidence burden in mixed-motive disparate treatment cases.

Petitioner posits that in defining direct evidence (in mixed-motive cases) the federal courts of appeal are split into three distinct groups: those using the "classic" definition; those using an "animus" definition; and those using an "animus-plus" definition. Petitioner fails to attribute this very analysis to its source, Circuit Judge Selya, the author of *Fernandes v. Costa Bros. Masonry,* 199 F.3d 572, 581 (1st Cir. 1999). Tracking Judge Selya's examples of these three schools of thought, Petitioner travels the same road among the circuits, citing the same cases. These cases began with a single premise, that a plaintiff must present direct evidence of discrimination in order to prove a mixed-motive employment discrimination case. The disagreement among the circuits involved the quality of that direct evidence in mixed-motive cases. This conundrum was eliminated by this Court's decision in *Desert Palace v. Costa,* 539 U.S. 90 (2003) which declared that direct evidence was not required. *Fernandes* has been abrogated. *Id.*

Whether or not there will be confusion between the mixed-motive framework and the pretext framework in future

cases is, for now, the grist for law review authors to grind. See, e.g., Jennifer R. Gowans, Note, *Plaintiffs' Direct Burden in Mixed-Motive Disparate Treatment Cases: An Analysis in Light of Costa v. Desert Palace*, 54 CASE W. RES. L. REV. (2003).

This case does not present a record that implicates any confusion or conflict about the definition of direct evidence. What is more, Petitioner has totally ignored the fact that this case was treated by the district court and the circuit court as a reduction-in-force termination, guided by different burdens. [Pet. App. 6, citing *Barnes v. GenCorp, Inc.*, 896 F.2d 1457, 1465 (6th Cir. 1990)]. No error in this regard is claimed by Petitioner. None of the cases belonging to any one of the three categories of circuits discussed by Petitioner was a workforce reduction termination. In short, Respondent respectfully suggests that the Petitioner is actually seeking an advisory opinion. He now appears to be looking for a new one-size-fits-all definition of direct evidence, when in reality, he was content with the definition used at every stage of his case.

CONCLUSION

Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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No. 04-390

OCT 20 2004

In The

Supreme Court of the United States

ANTHONY ROSSO,

Petitioner,

v.

THE A.I. ROOT COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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ARGUMENT

In addition to the reasons provided in the Petition, this Court should grant this Writ for several additional reasons, highlighted by Respondent's misunderstanding of the central import of the Petition to all direct evidence cases in age discrimination and disability discrimination cases. A clear and confusing split exists among the Circuits (and in the case of the Sixth Circuit, within the Circuit itself) as to the meaning of direct evidence. The Panel's opinion in this case simply highlights that division, and Petitioner could not raise the differing standards as an assignment of error below because it simply did not become an issue until the Panel handed down its opinion. Finally, Petitioner misunderstands this Court's long-standing, constitutionally founded prohibition against providing advisory opinions. An advisory opinion exists where there is no controversy between the litigants. In this case, there is real controversy – whether the A.I. Root Company terminated Anthony Rosso because of his age or perceived disability.

Indeed, if this case is "the grist for law review authors to grind" as Respondent argues [Opp. 9], has not Respondent conceded the split among the Circuits as to the meaning of direct evidence, and is not this case apt for this Court's judgment?

I. Respondent Mischaracterizes the Panel Opinion's Misapplication of the Direct Evidence Standard.

The Sixth Circuit held that John Root's statements that "Tony's old and I've got reports that he has severe memory loss," and that it "sounds like early Alzheimer's

Disease" [Pet. App. 2] "fails to provide sufficient evidence of age discrimination." [Pet. App. 4]. John Root also mentioned Mr. Rosso's job performance. [Pet. App. 2]. Accordingly, the Sixth Circuit found that because John Root "gave inconsistent reasons . . . when discussing Rosso's termination," a mixed-motive analysis applies. [Pet. App. 4]. The Sixth Circuit also (correctly) found that under the mixed-motive analysis of *Price Waterhouse* and its progeny, Mr. Rosso "must first furnish direct evidence that A.I. Root considered impermissible factors when it decided to discharge him." [Pet. App. 4] (citing *Wexler v. White's Fine Furniture, Inc.*, 317 F.3d 564, 571 (6th Cir. 1997)).

Relying on *Phelps v. Yale Sec., Inc.*, 986 F.2d 1020 (6th Cir. 1993), the Panel held that John Root's discriminatory comments "were too isolated and ambiguous" to constitute direct evidence of discrimination *at the time of his discharge* six months later. [Pet. App. 5]. Thus, contrary to Respondent's assertions, the Sixth Circuit did create a bright-line rule that direct evidence of discrimination can become stale with the passage of time, which passage the Panel decision ratchets back to a minimum of six months. In so ruling, the Panel appears to have applied the "animus-plus" analysis to direct evidence – an examination of the strength of the plaintiff's evidence to determine whether the plaintiff has satisfied the requisite evidentiary burden. [*See* Pet. 8-9]. That application, however, splits with previous Sixth Circuit precedent, and heightens the split among the Circuits on the core issue of how to define direct evidence of discriminatory intent. [*See* Pet. 11-12].

Respondent attempts to paint this Petition as a challenge as to the examination of the evidence by the

Panel. This Petition, however, is a challenge to the very definition of direct evidence applied by the Panel, and goes to the core of the application of mixed-motive analysis in age and disability discrimination cases across the various Circuits. Petitioner seeks for this Court to end the Circuits' and litigants' confusion in what constitutes direct evidence in all instances, and to provide concrete guidance on how courts should define direct evidence in all cases.

II. Petitioner could not waive an Argument that was Unavailable until *After* the Panel Handed Down its Decision.

It is impossible to comprehend how Respondent expects to hold Petitioner responsible for not raising an argument that could not have been available to him until after the Panel rendered its opinion. The precept of this Petition is simple: the Sixth Circuit's opinion exacerbates the confusion and dissention among the Circuits as to the application of mixed-motive analysis and the determination of what evidence constitutes direct evidence of discrimination. [Pet. 6-11]. Simply stated, there could not have been any discussion of the split among the Circuits as to the definition of direct evidence until the Sixth Circuit chose which definition it would apply. By discounting the direct evidence presented by Petitioner, the Panel highlighted and widened the split among the Circuits. Petitioner could not raise that issue, however, until the Sixth Circuit deviated from its precedent and widened the chasm by rendering the underlying decision in the first instance.

III. Petitioner is not Seeking an Advisory Opinion, but Seeks for this Court to Resolve Dissention among the Circuits as to the Meaning of Direct Evidence in Age and Disability Mixed-Motive Discrimination Cases.

It is axiomatic that "[t]he exercise of judicial power under Art. III of the Constitution depends on the existence of a case or controversy," and "a federal court [lacks] the power to render advisory opinions." *United States Nat. Bank of Ore. v. Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 446, 113 S. Ct. 2173, 2178, 124 L. Ed. 2d 402 (1993) (internal quotations omitted). An advisory opinion, however, lacks the "pursuance of an honest and actual antagonistic assertion of rights by one [party] against another . . . that valuable legal rights . . . [would] be directly affected to a specific and substantial degree." *Id.* (internal quotations omitted).

In this case, Mr. Rosso and the A.I. Root Company locked horns in both the trial court and the court of appeals as to whether the A.I. Root Company unlawfully discriminated against him on the basis of his age and a perceived disability. [Pet. 2-4]. Central to that battle is the appellate court's misapplication of the definition of "direct evidence," and the continued confusion of age and disability discrimination plaintiffs as to which specific standard a court might apply in any given case. [Pet. 4-16].

Thus, this Petition does not seek an advisory opinion, but instead seeks for this Court to eliminate the confusion that exists among the Circuits, a fulfillment of a tenet central to this Court's purpose. *See Wilson v. Layne*, 526 U.S. 603, 608, 119 S. Ct. 1692, 1696, 143 L. Ed. 2d 818 (1999) (noting that this Court had granted certiorari to

resolve "a split among the Circuits" on the issue presented).

CONCLUSION

It is respectfully requested that for all of the reasons cited herein and in the initial Petition, that this Court grant this Petition.

Respectfully submitted,

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